

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 4552 of 1987

with

SPECIAL CIVIL APPLICATION No 6609 of 1987

with

SPECIAL CIVIL APPLICATION No 6611 of 1987

For Approval and Signature:

Hon'ble MR.JUSTICE S.K.KESHOTE

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

SHARAD B PANDIT

Versus

STATE OF GUJARAT

Appearance:

1. Special Civil Application No. 4552/87
MR GIRISH PATEL for Petitioner
MS SIDDHI TALATI for Respondent No. 1
MS PJ DAVAWALA for Respondent No. 2
None present for Respondent No. 3
2. Special Civil Applications No 6609/87 & 6611/87
MR SB PANDIT for Petitioner
MS SIDDHI TALATI for Respondent No. 1

MS PJ DAVAWALA for Respondent No. 2

None present for Respondent No. 3

CORAM : MR.JUSTICE S.K.KESHOTE

Date of decision: 16/10/97

ORAL JUDGMENT

#. As all these three petitions are identical in nature, the same are taken up for hearing together and are being disposed of by this common order.

#. The respondent No.2, as stated by its counsel, has been wound up. The learned counsel for respondent No.2 states that the Official Liquidator is necessary party to this proceedings. I have examined this matter and I am of considered opinion that ultimately in case the claims of the petitioners for gratuity is accepted, the liability of the payment of the same is of State of Gujarat and respondent No.2 jointly and severally. However, that amount has to be deducted by the State Government from the compensation to be paid to respondent No.3, i.e. the amount found payable to the owner of the closed textile which has been nationalized under the provisions of the Gujarat Closed Textile Undertakings (Nationalization) Act, 1986 (hereinafter referred to as 'Act 1986'). As the State Government is a party here, I do not consider it to be necessary to implead the Official Liquidator as party to these petitions. The Official Liquidator has not to be discharge of the liability of the petitioners as their claim pertains to the period earlier to the "appointed day", as fixed under the aforesaid Act.

#. It is not in dispute that the respondent No.3 was a closed textile undertaking which has been nationalized under the provisions of the Act 1986. The "appointed day" under the aforesaid Act, is 8th November 1985. Section 5 (1) of the Act 1986 provides that "every liability of the owner of the specified textile undertaking in respect of any period prior to the appointed day, shall be the liability of such owner and shall be enforceable against him and not against the State Government or the Corporation". Section 7(1) of the Act 1986 provides that "the owner of every closed textile undertaking shall be given by the State Government, in cash and in the manner specified in Chapter V, for the transfer to, and vesting in, the State Government under sub section (1) of Section 3 of the specified textile undertaking and the right, title and

interest of the owner in relation to such textile undertaking, an amount equal to the amount specified against it in the corresponding entry in column (4) of the First Schedule. Sub section (4) of Section 7 of the Act 1986 stipulates that "where any liability of the owner specified in the Second Schedule is discharged by the State Government or the Corporation according to the order of the priorities mentioned in that Schedule, the amount to be paid to the owner under sub section (1) shall stand reduced to that extent". In the Second Schedule, there are four categories of order of priorities for the discharge of liabilities in respect of the Textile Undertakings. Category I pertains to all dues including gratuity of employees in the specified textile undertaking. Section 11 of the Act 1986 provides that services of every person employed by the owner before the appointed date shall stand terminated on the designated date if such person is not employed before that date by the Corporation under sub-section (1) or (2) of the section and on the date of his appointment if such person is employed before the designated date by the Corporation under sub section (1) or (2) aforesaid. This section further provides that a person whose services stand terminated under sub clause (i) of clause (a) shall not be entitled to claim employment in the Corporation as of right. Sub section 4 of this section provides that every person whose services stand terminated under sub clause (i) of clause (a) of sub section (3) shall be entitled to payment of gratuity and of compensation for retrenchment or closure in accordance with the provisions of the Payment of Gratuity Act, 1972 and the Industrial Disputes Act, 1947 if he is a workman within the meaning of the latter Act and payment of gratuity if he is not such workman. Sub clause (b) of sub section 4 of Section 11 of the Act is relevant and I consider it to be advisable to reproduce the same.

(b) Notwithstanding anything contained in Chapter V and notwithstanding that the liability for payment of gratuity and compensation for retrenchment or closure under clause (a) is that of the owner, such liability shall be discharged by the State Government or the Corporation, according to the order of priorities mentioned in the Second Schedule and on discharge of such liability by the State Government or the Corporation the owner shall stand discharged to the extent of the liability so discharged.

#. The facts of the case which are not in dispute are that the respondent No.3, the New Swadeshi Mills Ltd.,

was closed down on 18.6.84 and thereafter it was taken over under the provisions of the said Act by the Corporation, the respondent No.2 herein. The services of the petitioners came to an end automatically on closure of the textile undertaking. In all these three matters, a dispute has been raised regarding the amount of gratuity for which the petitioners claim themselves to be entitled. In Special Civil Application No.4552 of 1987, the petitioner has claimed the amount of gratuity of Rs.31,608/-. Though initially the claim appears to have been made for retrenchment compensation also, now that claim has not been pressed by petitioners. On 9.2.88, in these petitioners, the petitioners have given up their claim that they are the 'workmen' and they restricted their claim for gratuity under section 11(4)(a)(ii) of the Act 1986. In Special Civil Application No.4552 of 1987, it also appears that the petitioner has been paid Rs.11,000/- as gratuity amount and so far as the balance amount of his claim of gratuity is concerned, that amount was ordered to be deposited and the same is lying deposited in the F.D.R.

#. It is the contention of the learned counsel for the petitioners that there was a consistent and continuous practice in the closed textile undertaking, the respondent No.3, of making payment of gratuity to all staff members irrespective of their salary or designation on the basis of 1/2 months' salary for every completed year of service and without applying ceiling on salary or on the amount of gratuity. The petitioners in these Special Civil Applications have cited examples of many of the persons who have been given gratuity in the manner and fashion as aforesaid.

#. The learned counsel for respondent-State, on the other hand, contended that this is not a continuous practice. Many of the persons belonging to the category of officers were not given gratuity.

#. I have given my thoughtful considerations to the submissions made by learned counsel for the parties.

#. From the facts which have been stated on record, it come out that the respondent No.3 used to get its gratuity liability determined as at the end of each financial year by actuarial evaluation of all its employees, who rendered continuous service of five years or more and eligible and entitled to the payment of gratuity not only under the Act but also under the contract of service. The said liability of gratuity was disclosed in the Company's annual accounts. The

actuary's report of the Company's gratuity liability of each year showing the gratuity payable to each of its employee is available with the Company. In the Company's Income-tax returns, deduction for payment of gratuity was claimed as business expenditure on the ground that it was Company's liability to make such payment. Mr.B.G.Goyal, Ex President, drawing a monthly salary of Rs.6,000/- p.m. had resigned from the Company on 31st March 1977, filed a summary suit against the Company for recovery of gratuity amount. In the said suit, the Company admitted its practice of paying gratuity to senior staff members. Gratuity was paid. The Managing Director, Shri S.K.Agrawal, who resigned from the services of the Company in March 1977 was paid gratuity calculated taking into consideration the entire length of his service of 32 years. Shri H.R.Jangid, Commercial Manager of the Company, who resigned in May 1984, only a month before the closure of the Company was also paid gratuity calculated taking into consideration the entire length of his service. Further evidence has come on the record in the form of Affidavit of Shri Kalpak Rastogi, Company Secretary, who made a statement that the Company though had not framed any formal written Rules or scheme for payment of gratuity to the employees, not covered by the Payment of Gratuity Act, but notwithstanding the provisions of the said Act, all the staff members, irrespective of their salary or status were paid gratuity on the basis formula as claimed by the petitioners. Even those who had not rendered qualifying services were paid gratuity in the form of ex-gratia payment. The petitioners also filed an affidavit after inspection of Payment of Gratuity Register of the Company, respondent No.3, of the years 1980-81, 1981-82, & 1982-83, as well as the Report of actuarial valuation of gratuity liability for the years ended 31st March 1981, 30th June 1982 and 30th June 1983, and stated that the above referred documents show that gratuity was paid to travelling salesmen, stores incharge, spinning superintendent, personnel-cum-factory managers, stores purchasers and all the aforesaid category of persons are not covered by the Payment of Gratuity Act, but still they have been paid full gratuity keeping in view the entire period of service. An affidavit of Shri Meghraj Sharma is also filed who was writing Payment of Gratuity Register in his own hands for the last many years of the Company, respondent No.3. He made a statement that during the year 1982-83, his Department Head orally told him that the management has taken decision that henceforth gratuity would be paid to those employees who had completed ten years' of service on account of deteriorating financial position. However, about such

change, no notice was given to the staff members and hence some persons who retired or resigned around the year 1982 or thereafter, before completion of ten years' service, were not paid gratuity.

#. It is true that in the reply and particularly, affidavit-in-sur-rejoinder, few instances have been quoted by respondent-State to show that some of the employees who had rendered services for more than five years but less than ten years were not paid gratuity. But from the evidence on record as discussed above, I am satisfied that there was consistent and continuous practice in the Company, respondent No.3 to pay gratuity to all the staff members who are not covered under the Payment of Gratuity Act on the basis of 1/2 month's salary for every completed year of services. This consistent and continuous practice has been deviated in the case of petitioners and the reasons may be that the Company has closed down, but merely because the Company has been closed down and subsequently it was nationalized under the Act 1986, its liability to pay gratuity to the officers category to which the petitioners belong will not come to an end. That liability has to be discharged by the Government, the respondent herein by paying this amount to the petitioners from the amount of compensation to be paid to respondent No.3. This liability pertains to pre nationalization period and as such, as per the provisions of the Act, 1986, this liability has to be owned by respondent No.3 and where it fails to discharge its liability, the State of Gujarat has to see that this class of persons are paid the gratuity amount and to that extent the liability of the State Government to pay compensation to respondent No.3 stands discharged. It is really sorry state of affairs that despite of clear position as well as clear entitlement of the petitioners for gratuity, still these persons were compelled to approach this Court and for all these years, they have been deprived of this amount.

##. Taking into consideration the totality of the facts of this case, I am satisfied that these petitions deserve acceptance and accordingly the same are allowed. It is hereby declared that the petitioners are entitled for gratuity and calculation of the amount of gratuity payable to them has to be made on the basis of 1/2 month's salary for every completed year of service and without applying ceiling on salary or on the amount of gratuity for their complete services which they rendered with respondent No.3. The calculation of the amount of gratuity payable to the petitioners has to be made by respondent State within a period of three months from the

date of receipt of copy of this order and thereafter this amount has to be paid to the petitioners. This amount may be paid from the amount of compensation to be paid to respondent No.3. It is however made clear that it is not the personal liability of the State Government or the Corporation also. This liability is of the owner and the amount of gratuity has to be paid to the petitioners only from the amount of compensation which has been awarded to respondent No.3 and not from the funds of the State Government. The payment of this amount has to be made to the petitioners within one month from the date of determination of the gratuity amount found payable to them. So far as Special Civil Application No.4552 of 1987 is concerned, it is a case where Rs.19,000/- and odd is lying deposited in F.D.R. The office is directed to pay the amount of F.D.R. on its maturity to the petitioner. In case ultimately the liability of gratuity to be paid to the petitioner in this case is determined less than the amount which has been paid to the petitioner, minus the amount of interest accrued on the F.D.R., the same shall be realized from the petitioner. However, where, the amount is found payable to the petitioner in excess of the amount of gratuity paid to him, the balance thereof has to be paid to the petitioner in the stipulated period. Rule made absolute in aforesaid terms in all these three Special Civil Applications.

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(sunil)